Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

KATHERINE MOORE, ET AL

Petitioners,

v.

STICKS BILLIARDS, INC., ET AL

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Texas Dram Shop Act and/or the Act as interpreted and applied by the Texas Courts violate Petitioners' equal protection rights?

2. Do Texas Rules of Appellate Procedure 74(f) and/or 52(a), and/or the manner or means in which they have been interpreted and applied by the Texas Courts violate Petitioners' procedural due process rights?

3. Does the Texas Dram Shop Act and/or the Act as interpreted and applied by the Texas Courts violate Petitioners' substantive due process rights.

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings are as follows:

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Hovey v. Elliot, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897). 16, 17

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McKnight v. General Motors Corp., 908 F.2d. 104, 114-115 (7th Cir.1990) *cert. denied*, 499 U.S. 919, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991). 13

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Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). 18

Riley v. Triplex Communications, Inc., 874 S.W.2d 333, 337 (Tex. Civ. App.--Beaumont 1994, writ granted). 10
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Societe Internationale v. Rogers, 357 U.S. 197, 209-10, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958). 16, 17
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In The

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KATHERINE MOORE, ET AL

Petitioners

v.

STICKS BILLIARDS, INC., ET AL

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioners, KATHERINE MOORE, JAMES MOORE, and KATE MOORE, respectfully pray that a Writ of Certiorari issue to review the opinion by the Fourteenth Court of Appeals, rendered and filed in the above-entitled proceeding on July 18, 1996 and the denial of Application for Writ of Error by the Supreme Court of Texas.

OPINIONS BELOW

The Supreme Court of Texas denied the Application for Writ of Error and is represented in the appendix hereto. The memorandum decision of the Fourteenth Court of Appeals (Justices Yates, Hudson, and O'Neill) is unpublished and is printed in Appendix A hereto.

JURISDICTION

Petitioners initially brought suit in the 189th District Court located in Houston, Harris County, Texas. The Fourteenth Court of Appeals Opinion was rendered and filed on July 18, 1996. (Appendix A). The Supreme Court of Texas denied Petitioners' Application for Writ of Error

on February 21, 1997. (Appendix B). The Supreme Court of Texas denied Petitioners' Motion for Rehearing of Application of Writ of Error on April 10, 1997. (Appendix C). This Court's jurisdiction is invoked under Title 28, U.S.C. §1254(1).

STATEMENT OF CASE

A. The Accident

Petitioner Katherine Moore and Amy Collins were high school friends. Their freshman year of college was over and they had returned home for the summer vacation. Amy was 18 and Katherine had just celebrated her 19th birthday.

Amy spent the evening of June 9, 1989 and morning of June 10, 1989 with Katherine and other friends drinking beer at Respondent Sticks Billiards, a local pool hall and video game parlor owned and operated by the Respondent, Michael Frank. Although, under §106.03 of the Texas Alcohol Beverage Code (see Appendix D), it is illegal to sell, serve or allow a minor under 21 years of age to consume alcoholic beverages, Respondent Sticks capitalized upon, if not "enjoyed," its well-known reputation for its willingness to sell and/or make alcohol available to minors.

Amy purchased and/or drank significant amounts of beer during the four hours the girls socialized at the Respondents' place of business. Although Katherine later stated that she deeply wished she had watched the amount of alcohol Amy consumed that night, she did not. Sometime after 1:15 in the morning, Amy and Katherine decided to go home. The girls left Sticks with Amy behind the wheel.

Within a mile of the bar, Amy hit an esplanade, lost control of her vehicle and careened into a concrete retaining wall causing the car to go airborne. The car landed some fifty feet away and slammed head-on into a vacant car parked in the middle of a deserted movie theater parking lot. Katherine remained awake and trapped inside the car for almost an hour before she could be freed by the Houston Fire Department and taken to a

local hospital emergency room. In addition to numerous other injuries, the bones in Katherine's legs were shattered and her ankles essentially obliterated. Her treating surgeon described Katherine's injuries as the worst he had seen in twenty-two years as an orthopedic surgeon. Katherine has since undergone countless surgeries and years of physical therapy. Although now able to walk, Katherine continues to suffer significant physical impairment. It is expected that her physical condition will continue to worsen with age.

B. The Nature of the Case and the Statutes at Issue

Katherine Moore and her parents, James and Kate Moore, brought this present action alleging, among other causes of action, common law negligence and negligence *per se* pursuant to Respondents' violations of §§106.03 and 106.06 of the Texas Alcohol Beverage Code. The Texas Alcohol Beverage Code makes it a criminal offense to sell or provide alcohol to a "minor" -- a person under the age of 21. Alco. Bev. Code §§ 106.03, 106.06. (See Appendix D and E).

Prior to 1987, Texas common law did not hold a commercial provider of alcoholic beverages liable for damages suffered by an innocent victim who had been injured as a result of a patron's intoxication. The rationale behind the rule of non-liability was twofold. First, the consumption, not the sale of alcohol, was viewed as the sole proximate cause of the intoxication and thus the injury to a third person. Second, even assuming the sale of the alcohol was a proximate cause of the intoxication, it was believed that injury to a third person was not a foreseeable result of a patron's intoxication. Time and statistics (especially as they related to the ever growing body count from alcohol related car accidents) ultimately disproved the rationale which had previously been used to support the rule of no liability. In the summer of 1987, the Supreme Court of Texas, relying on the wisdom of sister states, recognized a common law duty to the public by those who serve alcoholic beverages. *El Chico Corporation v. Poole*, 732 S.W.2d 306 (Tex. 1987).

In *El Chico* the Texas Supreme Court considered whether a person injured by an intoxicated driver could recover from the person (or entity) who sold the alcohol to the intoxicated driver in violation of the

common law and the Texas Alcoholic Beverage Code. The plaintiffs contended liability could be imposed based upon common law negligence and negligence *per se* violations of the Texas Alcoholic Beverage Code. The Texas Supreme Court, after reviewing the decisions of other jurisdictions, concluded that "[t]he risk and likelihood of injury...is as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall" *Id.* at 311 (citations omitted). Noting that the express public policy of the Texas Alcoholic Beverage Code "is the protection of the welfare, health, peace, temperance, and safety of the people of the state" *Id.*, at 312, the Texas Supreme Court recognized a common law cause of action and a negligence *per se* cause of action for violations of the Texas Alcoholic Beverage Code.

Almost contemporaneously with the Texas Supreme Court decision in *El Chico*, the Texas Legislature amended the Texas Alcoholic Beverage Code. The intent of the legislature was to create a statutory cause of action against a provider of alcohol resulting from the intoxication of the recipient of those alcoholic beverages. The amendment, hereinafter referred to as the Dram Shop Act, provided:

> Sec. 2.02 Causes of action
>
> * * *
>
> (b) Providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter . . . upon proof that:
>
> > (1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and
> >
> > (2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damage suffered.

Section 2.03 of Chapter 2:

> The liability of *providers* under this chapter for the actions of their customers, members, or guests who are or become intoxicated is in lieu of common law or other statutory law warranties or duties of providers of alcoholic beverages. This chapter does not impose obligations on a provider of alcoholic beverages other than those expressly stated in this chapter. *This chapter provides the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older.*

(Emphasis added). (See Appendix F).

A "provider" is defined under the Act as "a person who sells or serves an alcoholic beverage under authority of a license...or a person who otherwise sells an alcoholic beverage to an individual." Alco. Bev. Code § 2.01(1). However, rather than mirror the cause of action as set forth in *El Chico*, the Dram Shop Act actually limits the liability of the most culpable providers of alcohol--those who profit from its sale. The net effect is that instead of protecting the public, the Dram Shop Act shields the profit driven commercial provider from liability for violations of the Alcoholic Beverage Code.

C. The Trial Court's Rulings

Even though Petitioners had properly pled causes of action based on common law negligence and negligence *per se* violations of the Texas Alcoholic Beverage Code, the trial court refused to submit issues and instructions on the same. The court found the Dram Shop Act was Petitioners' exclusive remedy against a commercial provider who serves alcoholic beverages to an intoxicated minor between the age of 18 and 21. According to the trial court, there is simply no cause of action outside the Dram Shop Act, despite the Texas legislature's acknowledgment that those under the age of 21 should be treated as minors for purposes of alcohol consumption. The holdings of the trial court have been affirmed by all

Texas Appellate Courts.

D. The Nature of the Issues Before this Honorable Court

The Dram Shop Act creates classes of plaintiffs with differing rights and remedies based on the age of the minor who injured the plaintiff and the status of the provider of the alcohol. If the plaintiff was injured by a minor between the age of 18 and 21 and that minor had been served alcohol by a "provider" (i.e., owner or employee of a commercial business) as defined in Chapter 2, the innocent victim loses his/her rights and remedies against the commercial provider for common law negligence or negligence *per se*. However, if the victim was injured by that same minor (between the ages of 18 and 21) and the alcohol was provided by a social host, the victim would have any and all common law causes of action against the social host, including causes of action for common law negligence and negligence *per se*.

The violations are compounded in that, in addition to creating improper classes of providers, the Dram Shop Act, as interpreted and applied by the Texas Courts, also improperly creates classes of "minors." The Texas Legislature recognized that persons under the age of 21 were incapable of responsibly consuming alcohol and thus, were in need of the state's protection. It also recognized that the public needs to be protected from the risks caused by those under 21 who were under the influence of alcohol. It is for those reasons that the Alcoholic Beverage Code made it a crime to provide alcohol to a "minor", a person under the age of 21, and placed that responsibility on the provider. The Dram Shop Act, however, completely excuses the provider and places responsibility solely on the shoulders of the person the legislature previously determined to be incapable of shouldering such responsibility -- the minor. This artificial distinction is not merely illogical and counterproductive but it is also contrary to the legislature's purpose in defining a person under the age of 21 as a minor in regard to alcohol consumption.

The Courts of the State of Texas have interpreted and applied the Dram Shop Act in a manner that deprives Petitioners Katherine Moore, James Moore and Kate Moore of their physical and mental well-being and avenues of redress for those injuries. Denying Petitioners relief for the injuries visited upon them by Respondents denies Petitioners the protections of the United States due process and equal protection guarantees.

In addition, the trial court committed reversible error when it improperly limited the length of trial, restricted cross-examination of witnesses and commented on the weight of the evidence to the jury. The appellate courts, citing the Texas Rules of Appellate Procedure, did not address the underlying actions of the trial court but instead summarily dismissed Petitioners points of error by concluding that Petitioners had failed to properly brief the points of error and thus waived any right to complain on appeal. The appellate courts dismissed the points without providing Petitioners an opportunity to amend their brief to cure any alleged shortcomings. The Appellate Rules upon which the appellate courts relied violate Petitioners' due process protections of the United States Constitution.

REASONS FOR GRANTING THE WRIT (ARGUMENTS)

I.

THE DRAM SHOP ACT AS INTERPRETED AND APPLIED DENIES PETITIONERS EQUAL PROTECTION AND CONSTITUTES SPECIAL LEGISLATION

The United States Constitution provides that no state shall deny any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amend. XIV, Sec. 1.

The United States Supreme Court has articulated three levels of scrutiny by which to review the challenged statute. The most stringent

standard of review, strict scrutiny, carries with it a presumption of unconstitutionality and requires that the challenged legislation be carefully tailored, neither over inclusive nor under inclusive, and necessary to the achievement of a compelling state interest. If the interests affected are those considered to be fundamental rights or if the legislation affects a suspect class, the legislation will be subject to review under the strict scrutiny standard. *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969).

The second standard of review, intermediate scrutiny, requires that a challenged statute be 'substantially related' to 'important government objectives'. *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976). This standard has been applied in equal protection cases, when interests are considered important, but not fundamental and the classification in the statute is sensitive, but not suspect. The Supreme Court of California applied this test when the alleged fundamental interest was "access to the courts." *Brown v. Merlo*, 506 P.2d 212 (1973) ("A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the legislation, so that all persons similarly circumstanced shall be treated alike.")

The third standard of review is the rational basis test. The rational basis test, the most differential standard of review, requires only that the law have a legitimate purpose and a rational relationship to the fulfillment of that purpose. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985). However, the classification must include all those similarly situated with respect to purpose. *Rinaldi v. Yeager*, 384 U.S. 306, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966).

The initial consideration under an equal protection analysis is to ascertain the interest affected by the legislation. Although Petitioners do not contend the legislation at hand concerns a suspect classification as that term has been defined, Petitioners do contend the legislation affects a fundamental interest and thus must withstand attack under the strict scrutiny approach. The legislation under challenge affects the open courts provision of the Texas Constitution (see Appendix G), the due process clause of the Texas Constitution (see Appendix H) and the United States

Constitution, and Article III, Section 56 of the Texas Constitution. (See Appendix I).

Should this Honorable Court hold that the interests espoused by Petitioners do not invoke the protections of strict scrutiny, Petitioners would contend the interests affected are sufficiently important in the public interest to require this Court to apply the intermediate standard. Because the present legislation creates a classification that is not substantially related to important governmental objectives it must fail under the intermediate standard of review. The classification created in the present case is one based on the status of the provider, be they licensed pursuant to Chapter 2 or merely a social host, and the age of the person who consumed the alcohol and injured an innocent third person. These classifications are not substantially related to important governmental objectives as defined in the statute and espoused by the Texas Supreme Court in *El Chico*.

Even if this Honorable Court does not apply the two more stringent levels of protection, the legislation is unconstitutional under the rational basis standard. There is no rational basis for the classifications created pursuant to Chapter 2 of the Alcoholic Beverage Code. If the intent of the legislature in passing the complained of statutes was for the protection of the welfare, health, peace, temperance and safety of the people of the state there is no rational basis by which one could exempt a "provider" as defined in Chapter 2 from liability and create artificial classifications of "minors."

The Texas Courts, in overruling Petitioners' point of error relating to equal protection contend that Petitioners have not shown "that they are being treated differently than any other person similarly situated...." That is not the case. Petitioners complained that when one views the legislation from the perspective of the innocent victim, the statute creates different classes of victims and creates or extinguishes the rights and remedies available to the victims based on the status of the person or entity who served the alcohol to the individual who injured the victim. This legislation and the manner in which it is interpreted and applied by the Texas courts constitutes a "special law" in that it unfairly favors a certain group -- commercial providers of alcohol who are guilty of violating §106.03 of the

Alcoholic Beverage Act. While there is no doubt that the legislature has the broad power to make classifications for legislative purposes and to enact laws for the regulation thereof (even though such legislation may be applicable only to a particular class of individuals), it is not empowered to adopt a classification that benefits only a specific group (to the exclusion of others similarly situated) as has been done in the case now before this Court. It is evident that the class effected by the Dram Shop Act "exclusive remedy provision," and not bound by the regulations of the Alcoholic Beverage Code, are the commercial providers who illegally profit from the sale of alcohol to minors. See *Riley v. Triplex Communications, Inc.*, 874 S.W.2d 333, 337 (Tex. Civ. App.--Beaumont 1994, writ granted) (50 percent loss of business attributable to ages 18 to 20). Legislating additional protections to that class of tortfeasors and law breakers is not reasonable in light of the public purpose sought to be accomplished through the passage of the provision of the Alcoholic Beverage Code and the Dram Shop Act -- the protection of the welfare, health, peace, temperance and safety of the people of the state. *El Chico*, 732 S.W.2d at 312. This is further evidenced by the criminal treatment afforded "providers" as compared to "social hosts" for furnishing alcohol to minors under the Alcoholic Beverage Code. Section 106.06 provides that a "social host" is subject to a fine of $100-$500 for making alcoholic beverages available to minors. However, a "provider" is not only subject to the same fine but is also subject to a one year prison term §106.03.

Furthermore, the legislation creates improper classifications of "minors." The distinction that the legislature imposed between minors under 18 and those between 18 and 21 years of age is unreasonable. The legislature has recognized that those under 21 years of age are incapable of responsibly consuming alcohol and therefore need protection from its deadly effects. There is also the recognition that "minors," when under the influence of alcohol, pose a greater risk to the public. There is no showing that the public is in greater need of protection from those minors under the age of 18 than they are from those from 18 to 21. In fact, it seems apparent that rather than the risk decreasing, it increases. Testimony during trial from Dr. Maurice Dennis, Petitioners' expert on alcohol and traffic safety, reflects this recognition. When asked why, in his opinion, Texas law was changed to increase the drinking age to 21 effective in 1986, Dr. Dennis indicated that studies sponsored by the U.S. Department

of Transportation revealed that young people (21 and younger) were overly involved in alcohol related crashes. The tort claimant is injured by someone who is served alcohol illegally. Whether that person served is 17, permitting a cause of action, or 18, forbidding a cause of action, creates an artificial distinction and is unreasonable and arbitrary from the standpoint of the tort claimant.

II.

TEXAS RULES OF APPELLATE PROCEDURE 74(f) AND 52(a) AS INTERPRETED AND APPLIED CONSTITUTE IMPROPER DEATH PENALTY SANCTIONS SO AS TO DENY PETITIONERS PROCEDURAL DUE PROCESS

Throughout the trial of this case the court repeatedly criticized Petitioners' counsel and witnesses and continuously disrupted and disallowed Petitioners' questioning during voir dire and direct and cross examination. The court's comments on the weight of the evidence, by and through its continued criticism of Petitioners' counsel, and its creation of an atmosphere akin to a "race against the clock," denied Petitioners their right to a full, fair and impartial hearing and was reasonably calculated to cause and probably did cause the rendition of an improper verdict.

Trial commenced Tuesday, July 27, 1993, in front of a visiting Judge. At that time the visiting judge told counsel, due to his schedule with the District Court, the trial of this case would have to be completed by Friday, July 30, 1993 at noon. From day one and continuing throughout the trial and in the presence of the jury, the court repeatedly criticized, reprimanded and threatened Petitioners' counsel. It began during voir dire when the judge refused, over objections, to allow Petitioners' counsel ample time within which to question the panel. (SF 99:5-22). Even though the court was provided with very specific and crucial areas of inquiry left untouched and unexplored, (SF 126:4-127:1; 127:17-128:13) the court refused counsel's request for additional time and finally instructed counsel that she was finished, and directed her to sit down. (SF 124:13-14; 128:14-129:14; 185:11-20).

After the jury was empaneled, the trial court continued to reprimand and criticize counsel for taking too long (SF 417:21-25; 421:23-422:3; 587:9-17) and even went so far as to excuse Respondent Frank from the witness stand in the middle of cross examination. (SF 616:2-16). The court refused to allow Petitioner Kate Moore to testify on matters concerning her loss of familial relationship. (SF 943:25-946:3; 946:19-950:2). The court refused to allow Petitioners' expert to testify on certain matters relevant to their claims and criticized Petitioners' counsel telling her that she had asked enough questions, needed to wind up, move along and that she just didn't listen when she attempted to question the witness even though the questions posed related to pertinent non-repetitive matters. The occurrence of these and numerous other similar instances in the presence and under the watchful eye of the jury clearly prejudiced the Petitioners and caused the rendition of an improper verdict.

The law in Texas has long been established that a judge may not comment on the weight of evidence in the presence of the jury nor may he criticize so as to indicate any favoritism or personal conviction during the course of trial. *Wilson v. White*, 29 Civ.App. 588, 69 S.W. 989 (1902) (writ dism'd), *Travelers Ins. Co. v. Simon*, 126 S.W.2d 674 (Tex.Civ.App.-Beaumont 1939, no writ), and *Southland Greyhound Lines, Inc. v. Matthews*, 74 S.W.2d 713 (Tex.Civ.App. - Beaumont 1934, writ denied). Such criticism would include comments which tend to impugn the integrity or ability of counsel; *Martin v. Bane*, 450 S.W.2d 142 (Tex.Civ.App. - Dallas 1969, no writ) and *Dallas Consol. Electric St. Ry. Co. v. McAllister*, 41 Civ.App. 131, 90 S.W. 933 (1905), or, comments which tend to imply that certain testimony is repetitious or irrelevant. *Acker v. Thompson*, 128 S.W.2d 859 (Tex.Civ.App. - Fort Worth 1939, no writ), *Commercial Standard Ins. Co. v. Billings*, 114 S.W.2d 712 (Tex.Civ.App.-Amarillo 1938, no writ), *City of Fort Worth v. Burton*, 193 S.W. 228 (Tex.Civ.App. - Fort Worth 1917, no writ) and *St. Louis & S.F.R.Co. v. Lane*, 49 Civ.App. 541, 110 S.W. 530 (1908) (no writ). In one particular case, reversible error was found where the judge stated, before the jury, that cross-examination, "had gone as far as [he] was going to let [it] go" and, over objections of counsel, dismissed the witness from the witness stand. *Texas Employers' Insurance Association v. Butler*, 287 S.W.2d 198 (Tex.Civ.App.-Fort Worth 1956, writ ref'd n.r.e.). In addition to Texas state law, federal law is clear that in order to fully and

fairly litigate each issue in their case, the Petitioners have the right to adequately cross examine witnesses *Harries v. United States*, 350 F.2d. 231, 236 (9th Cir. 1965) and to be provided sufficient court time to present their case without interference from the trial court. *McKnight v. General Motors Corp.*, 908 F.2d. 104, 114-115 (7th Cir.1990) *cert. denied*, 499 U.S. 919, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991).

Petitioners raised these issues on appeal, however, the Texas Court of Appeals and later, the Texas Supreme Court, refused to review the actions of the trial court. The court of appeals concluded:

> Appellants point to several instances where the trial court repeatedly criticized appellants' trial counsel and witnesses in the presence of the jury. Appellants further allege the trial court refused to give appellants' counsel additional time to examine witnesses. Moreover, Appellants claim the trial court refused to allow appellants' expert to testify on certain matters relevant to their claims.
>
> Appellants have omitted entirely any references to the record that would support a review of their assertions. . .

Opinion (see Appendix A, Page 6). In summarily dismissing Petitioners' claims, the Court of Appeals cited Rules 74(f) and 52(a) of the Texas Rules of Appellate Procedure.

Rule 74 (f) of the Texas Rules of Appellate Procedure provides:

> **(f) Argument.** A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any part of the charge given or refused, such part of the charge shall be

> set out in full. If complaint is made of the improper admission or rejection of evidence, the substance of such evidence so admitted or rejected shall be set out with references to the pages of the record where same may be found. Repetition or prolixity of statement or argument must be avoided. Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party. (See Appendix J).

Rule 52(a) of the Texas Rules of Appellate Procedure provides:

> **(a) General Rule.** In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court. (See Appendix K).

The court's reliance on Rules 74(f) and 52(a) is improper since neither rule provides any guidance for the dismissal of an appeal based on failure to adequately brief. It is within Rules 74(o), 74(p) and 83 of the Texas Rules of Appellate Procedure that one finds guidance as to the appropriate actions of an appellate court when faced with what they consider to be inadequate briefing. Rule 74(o) provides that, "[i]f the court shall strike or refuse to consider any part of a brief, *the court **shall** on reasonable terms allow the same to be amended or supplemented.*"(Emphasis added) Rule 74(p) provides:

> (p) **Briefing Rules to Be Constructed Liberally**. The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will

> enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; *but for a **flagrant violation** of this rule the court **may require the case to be rebriefed***.

(Emphasis added). Rule 83 provides:

> *A judgment shall not be affirmed* or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, *without allowing a reasonable time to correct or amend such defects or irregularities* provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 and except that in criminal cases late filing of the transcript or statement of facts may be permitted on a showing that otherwise the appellant may be deprived of effective assistance of counsel.

(Emphasis added). (See Appendix L).

Petitioners contend that they did in fact adequately brief their legal points and that they provided nine well-articulated points for the court's consideration. However, if their brief was lacking what the Court considered to be appropriate cites to the record the remedy is, as contained within Rules 74(o) (see Appendix M), 74(p) (see Appendix N) and 83 (see Appendix L) of the Texas Rules of Appellate Procedure, to order rebriefing. In fact Petitioners, during oral argument, offered to amend, supplement and/or re-brief. In their Motion for Rehearing Petitioners requested that they be allowed to amend their brief and pointed the Court of Appeals to the numerous references in the trial transcript of the complained of conduct. There is no evidence in the record that Petitioners committed any flagrant violation as contained in Rule 74(p). If Petitioners' conduct was deemed to be flagrant, then Petitioners would contend that the term "flagrant" in this rule is vague and ambiguous and fails to provide adequate notice to Petitioners.

From the record and the opinion of the Texas Court of Appeals it

is obvious the conduct which the Court of Appeals deems offensive is that of counsel in failing to provide cites referencing the Statement of Facts in Petitioners' brief. This is nothing more than a "death penalty" sanction imposed upon Petitioners for counsel's conduct without due regard for Petitioners' constitutional protections. The Court of Appeals ignores the fact that there are federal constitutional limitations upon the power of courts to dismiss an action with a "death penalty" sanction without affording a party the opportunity for a hearing on the merits of his cause. *Societe Internationale v. Rogers*, 357 U.S. 197, 209-10, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958), *citing Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-51, 29 S.Ct. 370, 379-80, 53 L.Ed. 530 (1909), and *Hovey v. Elliot*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897); *Accord Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-06, 102 S.Ct. 2099, 2105-06, 72 L.Ed.2d 492 (1982). "Death penalty" sanctions should not be allowed unless a party's hindrance of the process justifies a presumption that his claims lack merit. *Insurance Corp of Ireland*, 456 U.S. 694, 705-06, 102 S.Ct. 2099, 205-06; *Societe Internationale*, 357 U.S. at 209-10, 78 S.Ct. at 1094; *Hammond Packing*, 212 U.S. at 350-51, 29 S.Ct. at 379-80. In fact, sanctions such as that granted by the Court against Petitioners should only be assessed by a Court when a party acts in flagrant bad faith or counsel acts with callous disregard for the responsibilities of discovery. *National Hockey League*, 427 U.S. at 642-643, 96 S.Ct. at 2780-81. No evidence exists in this case for the Court of Appeals to have found either flagrant bad faith by the Petitioners or callous disregard for the responsibilities of discovery on behalf of Petitioners' counsel.

In *Societe Internationale*, this Honorable Court, in reversing the "death penalty" sanction in that case, found that the dismissal of that case was error when "it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." 357 U.S. 197, 212, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958). The Court went on to state that the proper procedure would be to allow any procedural problems to go to the adequacy of petitioner's proof and should not preclude petitioner from being able to argue the merits. *Id.* at 213.

Nowhere does the record indicate or imply that Petitioners were, in any way, at fault or that Petitioners in any way knew, should have known

and/or acquiesced in counsel's conduct. Any sanction the Court felt was appropriate should have been visited upon Petitioners' counsel and not Petitioners. Furthermore, to protect Petitioners' due process guarantees, the Texas Court of Appeals should have considered less severe sanctions including, but not limited to, allowing Petitioners an opportunity to amend. Petitioners offered to amend and/or supplement their brief and in their Motion for Rehearing requested they be allowed to amend their brief and pointed the Court of Appeals to over 20 references in the record which supported their position. However, rather than acknowledge the Petitioners' willingness to comply, their offers fell on deaf ears and the Appellate Court summarily dismissed the points of error.

A plaintiff's cause of action should not be made to suffer for the acts of his attorney, completely outside his control. The rational of *Societe Internationale* in setting aside the death penalty sanctions is applicable to the present case. *Societe Internationale*, 357 U.S. 197, 209-10, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958), *citing Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-51, 29 S.Ct. 370, 379-80, 53 L.Ed. 530 (1909), and *Hovey v. Elliot*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897). In short, these are merely death penalty sanctions at an appellate level where there has been but one violation and no order to remedy and bring the brief into compliance. In addition, there has been no showing of the client's knowledge or participation or apathy in handling the violation, nor a showing that Petitioners' counsel showed callous disregard for the process. Therefore, the Texas Court of Appeals, by and through its application and interpretation of Rules 74 and 52, has deprived Petitioners of their constitutional right to due process as defined by the United States Constitution. This case should be reversed and remanded for a proper state appellate review of the underlying points of error.

III.

THE TEXAS DRAM SHOP ACT AS INTERPRETED AND APPLIED ABROGATES PETITIONERS' COMMON LAW CAUSES OF ACTION GROUNDED IN NEGLIGENCE AND NEGLIGENCE PER SE IN VIOLATION OF PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS

The Trial Court based its charge on the exclusive remedy provision of §2.03 of the Texas Alcoholic Beverage Code. (See Appendix O). Petitioners objected to the Court's charge on the basis that there should be submitted a basic definition regarding negligence and ordinary care in relation to minors. In addition, the court did not permit jury instructions to support a cause of action for negligence based on the illegal service of alcohol to a minor. The court, in submitting the charge exclusively under §2.03, unreasonably abridged Petitioners' rights to obtain redress for Respondents' improper conduct and failed to provide a reasonable substitute remedy for the abrogation of those rights. As such, the Dram Shop Act violates the due process provisions of the United States Constitution.

The United States Constitution Due Process Clause states that no state shall deprive any person of life, liberty or property without due process of law. U.S. Const. Amend. XIV, sec. 1. A statute violates substantive due process when it does not bear a real and substantial relationship to an appropriate government objective. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). Stated another way, the test of substantive due process is whether the regulation is reasonable in relation to the goal to be attained and is adopted in the interest of the community as a whole. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

The distinction the legislature imposed between minors under 18 and those 18 and over is unreasonable and not rationally related to a legitimate state interest. The legislature has recognized that those under 21 years of age are in need of protection from the effects of alcohol. There is also recognition that the public needs protection from those under 21 under the influence of alcohol. Testimony during trial from Dr. Maurice Dennis, the appellants' expert on alcohol and traffic safety, reflects this recognition.

Abrogating all common law causes of action grounded in negligence and negligence *per se* against a defendant for serving minors between the ages of 18 and 21 does not attain any permissible legislative objective. This is particularly true in light of Dr. Dennis' testimony that in regard to females from 16 to 20, as various blood alcohol concentration levels go up, there is a significant increase in the chance of a driver fatality.

In fact, minor females in this age range with a blood alcohol level of .15 are 314.2 times as likely to be involved in fatal single vehicle accidents. That this is the age range corresponding to the ages of Amy Collins and Katherine Moore is undisputed as is the fact that four hours after the accident Amy Collins had a blood level of .16.

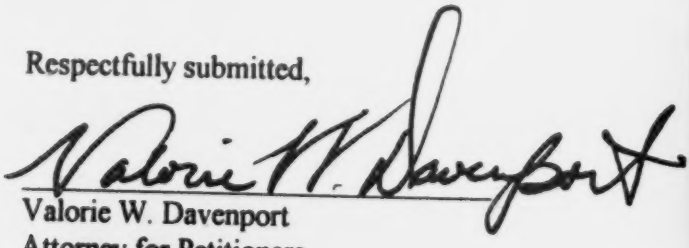
The legislature's goal in providing limited circumstances when a provider of alcohol can be held liable is outweighed by the unreasonable and arbitrary restriction of a common law cause of action when a person illegally served alcohol illegally injures another. As such, §2.03 of the Alcoholic Beverage Code violates Petitioners' due process rights and fails to provide a reasonable substitute remedy.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the opinion of the Fourteenth Court of Appeals affirming the judgment of the trial court and the denial of Application for Writ of Error in this matter.

DATED: July 7, 1997.

Respectfully submitted,



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APPENDIX A

Affirmed and Opinion filed July 18, 1996.

In The

Fourteenth Court of Appeals

NO. 14-93-01115-CV

KATHERINE MOORE, JAMES MOORE, and KATE MOORE, Appellants

V.

STICKS BILLIARDS, INC. and MICHAEL D. FRANK, Appellees

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Cause No. 90-63838

OPINION

Appellants, Katherine Moore, James Moore, and Kate Moore, bring this appeal asserting the Texas Dram Shop Act is unconstitutional. Appellants raise nine points of error, contending the trial court erred in: (1) refusing to submit jury questions on common law negligence and negligence per se because Chapter 2 of the Texas Alcoholic Beverage Code violates the open courts, due process, and equal protection guarantees of the Texas and United States Constitutions; (2) submitting a jury question on the issue of Katherine Moore's comparative fault; (3) violating appellants' right to full and fair access to the courts by attempting to shorten arbitrarily the length of trial; (4) granting a directed verdict and

dismissing James and Kate Moore's claims for loss of consortium; (5) failing to require the defendants to articulate a racially neutral reason for the exclusion of certain minority members of the jury panel; and (6) excluding evidence that Sticks pool hall was the alter ego of Michael Frank. We affirm.

On June 9, 1989, nineteen-year-old appellant, Katherine Moore, and her eighteen-year-old friend, Amy Collins, were involved in an automobile accident. Collins, the driver of the car, lost control of her vehicle after leaving Sticks Billiards, a pool hall owned and operated by Michael Frank. Police concluded that Collins was intoxicated. Moore was taken to a hospital where she underwent several surgeries to repair massive leg injuries.

While at Sticks, Moore had purchased a bucket of beer for her friends, by presenting a false identification card to conceal her status as a minor. Moore testified she drank only two beers. More further testified she never saw Collins buy a beer and she never appeared to be intoxicated. The bartender did not recall serving Moore or Collins alcohol.

The case went to trial and the trial court entered a directed verdict against Katherine's parents for their loss of consortium claims. The jury found no liability on the part of Sticks and Michael D. Frank, and assessed 100% liability on appellant, Katherine Moore.

Appellants contend in points of error one, two, three, and five that the trial court erred in refusing to submit jury questions on common law negligence and negligence per se. The supreme court has recognized that an alcoholic beverage provider has a common law duty to refrain from serving alcoholic beverages to a person whom the provider knows or should know is intoxicated. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311-12 (Tex. 1987). In reaching its decision, the court relied upon (1) the common law duty of reasonable care based on the principle of foreseeability, and (2) the existence of a penal statute prohibiting the sale of alcoholic beverages to an intoxicated person. *Id.* at 312. The court reasoned that the "unexcused violation of a statute setting an applicable standard of care constitutes negligence as a matter of law if the statute is designed to prevent an injury to that class of persons to which the injured

party belongs." *Id.*

Because a penal statute prohibits the sale of alcoholic beverages to minors, appellants contend appellees violated a statutory standard of care when they sold alcohol to Katherine. *See* TEX. ALCO. BEV. CODE ANN. § 106.03 (Vernon 1995) [1] Relying upon *El Chico*, appellants claim they should have been permitted to pursue a common law action for negligence against appellees. However, *El Chico* was decided prior to the enactment of Chapter 2 of the Alcoholic Beverage Code.[2] Section 2.03 of the code now provides that the liability of an alcoholic beverage provider is governed by Chapter 2 of the Alcoholic Beverage, commonly known as the "Dram Shop Act." TEX. ALCO. BEV. CODE ANN. § 2.03 (Vernon 1995). Chapter 2 of the code is the exclusive remedy in lieu of other common law or statutory remedies. *Born v. Virginia City Dance Hall & Saloon*, 857 S.W.2d 951, 956 (Tex. App.--Houston [14th Dist.] 1993, writ denied). Assuming liability can arise by serving alcohol to a minor, appellants contend the Dram Shop Act [3]deprives persons who are at least 18, but less than 21, years of age of their common law cause of action in violation of the Texas open courts doctrine, due process, and equal protection guarantees. *See* U.S. CONST. amend. XIV; TEX. CONST. art. 1, §§ 3, 13.

Equal protection mandates similar treatment under the law for those who are similarly situated. A strong presumption exists that a valid

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1 Section 106.03(a) provides: "A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor." Within the Alcoholic Beverage Code, "minor" is defined as a person under 21 years of age. TEX. ALCO. BEV. CODE ANN. § 106.01 (Vernon 1995).

2 See *Boyd v. Fuel Distributors Inc.*, 795 S.W.2d 266, 273 (Tex. App.--Austin 1990, writ denied) (stating that chapter 2 of the Alcoholic Beverage Code, enacted June 1, 1987 did not govern actions arising before its effective date of June 11, 1987, and thus did not control the disposition of *El Chico* which was decided June 3, 1987); 1987 Tex. Gen. Laws, ch. 303 §, at 1675; *Fuller v. Maxus Energy Corp.*, 841 S.W.2d 881, 884 (Tex. App.--Waco 1992, no writ).

legislative enactment is constitutional. *Vinson v. Burgess*, 773 S.W.2d 263, 266 (Tex. 1989). The burden to prove otherwise is on the party attacking the constitutionality of the enactment. *Texas Public Building Authority v. Mattox*, 686 S.W.2d 924, 927 (Tex. 1985).

To establish that a statute violates the open courts provision, one must show that he has a cognizable common law cause of action that the Legislature has restricted. *Sax v. Votteler*, 648 S.W.2d 661, 665-66 (Tex. 1982). Moreover, appellants must show that the restriction is unreasonable or arbitrary when balanced against the purposes and basis of the statute. *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988).

When the legislature enacted laws regarding the consumption and sale of alcoholic beverages, it chose to regulate the conduct and protect the interests of older minors differently from younger ones. *See Boyd v. Fuel Distributors, Inc.*, 795 S.W.2d at 275; *Fuller v. Maxus Energy Corp.*, 841 S.W.2d at 885. In 1973, the legal age of majority was set at eighteen for many purposes, including the legal drinking age under the Alcoholic Beverage Code. *Id.* In 1981, the legal drinking age was raised to nineteen, and in 1985 the age was again raised to twenty-one. The latter act was taken for the express purpose of avoiding the suspension of federal highway funds. *Id.*

The age of majority, except as provided by the Alcoholic Beverage Code, is eighteen. TEX. CIV. PRAC. & REM. CODE ANN. § 129.001 (Vernon 1992). An eighteen-year-old can marry, vote, contract, and go to war. Parents are not liable for the actions of a child eighteen years of age or older. TEX. FAM. CODE ANN. § 33.01 (Vernon 1986). In every respect, except under section 106.03 of the Alcoholic Beverage Code, an eighteen-year-old is an adult under the laws of this state and presumably capable of making adult decisions. Thus, treating eighteen, nineteen, and twenty years olds the same as other adults for liquor liability purposes is not arbitrary and unreasonable. *Fuller v. Maxus Energy Corp.*, 841 S.W.2d at 885.

Appellants claim that Section 2.03 arbitrarily and unreasonably prevents minors from recovering from a provider who has negligently supplied them with alcoholic beverages. Appellants have failed to show

that they are being treated differently than any other person similarly situated, and thus, have not overcome the presumption that the Texas Dram Shop Act is constitutional. Accordingly, we overrule appellants' points of error one, two, three, and five.

Appellants assert in points of error four and seven that the trial court erred in submitting an instruction to the jury on Katherine Moore's contributory fault and in granting a directed verdict against James and Kate Moore for their loss of consortium claim. Appellants conceded at oral argument these issues would be moot if we found the exclusive remedy for damages to be Chapter 2 of the Alcoholic Beverage Code. Because we believe Chapter 2 is the exclusive remedy for appellants, we hold the trial court did not err in submitting the issue of Katherine Moore's contributory fault. *See Smith v. Sewell*, 858 S.W.2d 350, 351 (Tex. 1993) (holding the Comparative Responsibility Act is applicable to actions under Chapter 2 of the Alcoholic Beverage Code). Further, a cause of action for loss of consortium is a derivative action and any percentage of negligence attributable to Katherine Moore will reduce the parents' recovery. *Cf. Reagan v. Vaughn*, 804 S.W.2d 463, 468 (Tex. 1990) (holding any percentage of negligence attributable to parents under comparative negligence will reduce amount of child's recovery). As such, the defense bars all or part of the injured child's recovery and has the same effect on the parent's recovery. *Id.* Because the jury found Katherine Moore 100% liable, all recovery is barred. We overrule appellants' points of error four and seven.

In their sixth point of error, appellants assert the trial court erred in attempting to arbitrarily shorten the length of trial and that such conduct was a denial of appellants' full and fair access to the courts as guaranteed under the Texas and United States Constitutions. Appellants point to several instances where the trial court repeatedly criticized appellants' trial counsel and witnesses in the presence of the jury. Appellants further allege the trial court refused to give appellants' counsel additional time to examine witnesses. Moreover, Appellants claim the trial court refused to allow appellants' expert to testify on certain matters relevant to their claims.

Appellants have omitted entirely any references to the record that

would support a review of their assertions. TEX. R. APP. P. 74(f). To properly preserve a complaint on appeal a party must present to the trial court a timely request, objection, or motion. TEX. R. APP. P. 52(a); *Cannon v. Lemon*, 843 S.W.2d 178, 183 (Tex. App.--Houston [14th Dist.] 1992, writ denied). Moreover, if an attorney fails to object promptly to a derogatory comment or other impropriety, the matter is waived. *Gillum v. Temple*, 546 S.W.2d 361, 365 (Tex. Civ. App.--Corpus Christi 1976, writ ref'd n.r.e.). Because appellants failed to preserve this point of error, their sixth point of error is overruled.

Appellants' eighth point asserts the trial court erred in failing to require appellees to articulate a racially neutral reason for the exclusion of certain members of the jury panel. In fact, the trial court conducted a *Batson*[3] hearing, and appellees' counsel articulated racially neutral reasons for striking specific venire persons. We have reviewed the record and have discovered that with the exception of venire member number 26, appellants failed to establish the racial and/or ethnic background of the challenged venire members. Appellants also failed to preserve in the record the racial and/or ethnic composition of the venire. It is impossible from the record before us to determine whether appellees engaged in purposeful discrimination. Nothing has been preserved for review, and appellants' eighth point of error is overruled.

Appellants point of error number nine asserts that trial court erred in excluding evidence that Sticks was the alter ego of Michael Frank. Appellants have presented no citations to the record or legal authority to support this point. Points of error must be supported by argument and authority or the points are waived on appeal. TEX. R. APP. P. 74(f); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 934 (Tex. 1983); *Arrechea v. Arrechea*, 609 S.W.2d 852, 855 (Tex. Civ. App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.). Therefore, appellants' ninth point of error is overruled.

Finally, appellee, Michael Franks asserts a cross point asking us to impose sanctions on appellants under the authority of Rule 84 of the

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3 *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986).

Texas Rules of Appellate Procedure. Rule 84 provides in part:

> In civil cases where the court of appeals shall determine that an appellant has taken an appeal for delay and without sufficient cause, then the court may, as part of its judgment, award each prevailing Appellee an amount not to exceed ten percent of the amount of damages awarded to such appellee as damages against the appellant.

A court of appeals should not impose a penalty for a frivolous appeal unless the record clearly shows the appellant has not pursued the appeal in good faith and has no reasonable expectation the judgment will be reversed. *Holberg & Co. v. Citizens Nat. Assur. Co.*, 856 S.W.2d 515, 518 (Tex. App.--Houston [1st Dist.] 1993, no writ); *Finch v. Finch*, 825 S.W.2d 218, 226 (Tex. App. Houston [1st Dist.] 1992, no writ). In *Holberg* the court of appeals assessed a $5,000 sanction because the brief was slightly over two pages long, made no citation to the record, and listed only one case as authority. The court decided the appellant did not pursue the appeal in good faith.

In *General Elec. Credit Corp. v. Midland Cent. Appraisal Dist.*, 826 S.W.2d 124, 125 (Tex. 1991), the Texas Supreme Court reversed sanctions because the appellant's brief was well-researched and raised several arguable points of error. The court stated that even though the appellant's arguments were unconvincing, the appeal had a reasonable basis in law and constituted an informed, good faith challenge to the trial court's judgment. *Id.* In the instant case, we believe the appellants made a good faith challenge to the decision of the court below. Therefore, we deny the request for sanctions. Appellees' first cross point is overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed July 18, 1996.

Panel consists of Justices Yates, Hudson, and O'Neill.

Do not publish -- TEX. R. APP. 90.

APPENDIX B

THE SUPREME COURT OF TEXAS
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February 21, 1997

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RE: Case Number 96-0942
Style: KATHERINE MOORE, JAMES MOORE, and KATE MOORE
v.
STICKS BILLIARDS, INC., and MICHAEL D. FRANK

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

by /s/_____
Michael Kopp, Deputy

APPENDIX C

THE SUPREME COURT OF TEXAS

Post Office Box 12248
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April 10, 1997

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Houston, TX 77007-7499

Mr. William K. Luyties
Lorance & Thompson
303 Jackson Hill, #100
Houston, TX 77007-7499

RE: Case Number 96-0942
Style: KATHERINE MOORE, JAMES MOORE, and KATE MOORE
v.
STICKS BILLIARDS, INC., and MICHAEL D. FRANK

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application of writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/_____
Michael Kopp, Deputy

APPENDIX D

ALCOHOLIC BEVERAGE CODE

§ 106.03. Sale to minors

(a) A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor.

(b) A person who sells a minor an alcoholic beverage does not commit an offense if the minor falsely represents himself to be 21 years old or older by displaying an apparently valid Texas driver's license or an identification card issued by the Texas Department of Public Safety, containing a physical description consistent with his appearance for the purpose of inducing the person to sell him an alcoholic beverage.

(c) Except as provided in Subsection (d) of this section, a violation of this section is a misdemeanor punishable by a fine of not less than $100 nor more than $500, by confinement in jail for not more than one year, or by both.

(d) If a person has been previously convicted of a violation of this section or Section 101.63 of this code, a violation is a misdemeanor punishable by a fine or not less than $500 nor more than $1000, by confinement in jail for not more than one year, or by both.

APPENDIX E

ALCOHOLIC BEVERAGE CODE

§ 106.06. Purchase of alcohol for a minor; furnishing alcohol to a minor.

(a) Except as provided in Subsection (b) of this section, a person commits an offense if he purchases an alcoholic beverage for or gives or with criminal negligence makes available an alcoholic beverage to a minor with criminal negligence.

(b) A person may purchase an alcoholic beverage for or give an alcoholic beverage to a minor if he is the minor's adult parent, guardian or spouse, or an adult in whose custody the minor has been committed by a court, and he is visibly present when the minor possesses or consumes the alcoholic beverage.

(c) A violation of this section is a misdemeanor punishable by a fine of not less than $100 nor more than $500.

(Chgd. by L.1993, chaps. 437(4), 934(79), eff. 9/1/93.)

APPENDIX F

ALCOHOLIC BEVERAGE CODE

§ 2.02. Causes of Action

(a) This chapter does not affect the right of any person to bring a common law cause of action against any individual whose consumption of an alcoholic beverage allegedly resulted in causing the person bringing the suit to suffer personal injury or property damage.

(b) Providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter and may be made the basis of a revocation proceeding under Section 6.01 (b) of this code upon proof that:

(1) at the time the provision occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and

(2) the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

Added by Acts 1987, 70th Leg., ch. 303, § 3, eff. June 11, 1987.

APPENDIX G

TEXAS CONSTITUTION, art. I

§ 13. Excessive bail or fines; cruel and unusual punishment; remedy by due course of law

Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

APPENDIX H

TEXAS CONSTITUTION, art. I

§ 19. Deprivation of life, liberty, etc.; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

APPENDIX I

TEXAS CONSTITUTION, art. III

§ 56. Local and special laws

Sec. 56. The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing:

The creation, extension or impairing of liens;

Regulating the affairs of counties, cities, towns, wards or school districts;

Changing the names of persons or places;

Changing the venue in civil or criminal cases;

Authorizing the laying out, opening, altering or maintaining of roads, highways, streets or alleys;

Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State;

Vacating roads, town plats, streets or alleys;

Relating to cemeteries, grave-yards or public grounds not of the State;

Authorizing the adoption or legitimation of children;

Locating or changing county seats;

Incorporating cities, towns or villages, or changing their charters;

For opening and conducting of elections, or fixing or changing the places of voting;

Granting divorces;

Creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts;

Changing the law of descent or succession;

Regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or the providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate;

Regulating the fees, or extending the powers and duties of aldermen, justicies of the peace, magistrates or constables;

Regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes;

Fixing the rate of interest;

Affecting the estates of minors, or persons under disability;

Remitting fines, penalties and forfeitures, and refunding moneys legally paid into the treasury;

Exempting property from taxation;

Regulating labor, trade, mining and manufacturing;

Declaring any named person of age;

Extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of his official duties, or his securities from liability;

Giving effect to informal or invalid wills or deeds;

Summoning or empaneling grand or petit juries;

For limitation of civil or criminal actions;

For incorporating railroads or other works of internal improvements;

And in all other cases where a general law can be made applicable, no local or special law shall be enacted; provided, that nothing herein contained shall be construed to prohibit the Legislature from passing special laws for the preservation of the game and fish of this State in certain localities.

APPENDIX J

TEXAS RULE OF APPELLATE PROCEDURE 74

Requisites of Briefs

(f) Argument. A brief of the argument may present separately or grouped the points relied upon for reversal. The argument shall include: (1) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any part of the charge given or refused, such part of the charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the substance of such evidence so admitted or rejected shall be set out with references to the pages of the record where same may be found. Repetition or prolixity of statement or argument must be avoided. Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party.

APPENDIX K

TEXAS RULE OF APPELLATE PROCEDURE 52

Preservation of Appellate Complaints

(a) General Rule, In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court.

APPENDIX L

TEXAS RULE OF APPELLATE PROCEDURE 83

A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 and except that in criminal cases late filing of the transcript or statement of facts may be permitted on a showing that otherwise the appellant may be deprived of effective assistance of counsel.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986.)

APPENDIX M

TEXAS RULE OF APPELLATE PROCEDURE 74

Requisites of Briefs

(o) Amendment or Supplementation. Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented.

APPENDIX N

TEXAS RULE OF APPELLATE PROCEDURE 74(p)

(p) **Briefing Rules to Be Constructed Liberally.** The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interest of justice; but for a flagrant violation of this rule the court may require the case to be rebriefed.

APPENDIX O

ALCOHOLIC BEVERAGE CODE

§2.03. Statutory Remedy

The liability of providers under this chapter for the actions of their customers, members, or guests who are or become intoxicated is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages. This chapter does not impose obligations on a provider of alcoholic beverages other than those expressly stated in this chapter. This chapter provides the exclusive cause of action for providing an alcoholic beverage to a person 18 years of age or older.

Added by Acts 1987, 70th Leg., ch. 303, § 3, eff. June 11, 1987.